

**BIENSTOCK & CLARK**  
A Partnership Including Professional Associations  
311 SOUTH WACKER DRIVE, STE. 4550  
CHICAGO, ILLINOIS 60606  
TELEPHONE: 312-697-4965  
FACSIMILE: 312-697-4966

**ORIGINAL**

**Lisa Chandler Cordell**

July 31, 1999

**DOCKET FILE COPY ORIGINAL**

**Ms. Magalie Roman Salas**  
Secretary  
Federal Communications Commission  
445 Twelfth Street, S.W., Room TW-A325  
Washington, D.C. 20554

**VIA FEDERAL EXPRESS  
RECEIVED**

AUG 02 1999

**FCC MAIL ROOM**

**Re: CS Docket No. 96-85; Cable Act Reform  
Petition for Reconsideration and Partial Stay of Small Cable Affiliation  
Rules**

Dear Ms. Salas:

On behalf of the American Cable Association, we enclose an original and eleven (11) copies of the above-referenced **Petition for Reconsideration and Partial Stay of Small Cable Affiliation Rules**.

In addition, we provide a "FILE COPY." We ask that you date-stamp and return it in the enclosed Federal Express envelope.

If you have any questions, please call us.

Very truly yours,

*Lisa Chandler Cordell*

Lisa Chandler Cordell

Enclosure

cc: American Cable Association  
Eric E. Menge, Small Business Administration  
Service list

Inc:C:\CLIENTS\ACA\Cable Act Reform\transmittal\_petitionforrecon.ltr.wpd

No. of Copies rec'd 0+11  
List ABCDE

3250 Ocean Park Boulevard, Suite 350  
Santa Monica, California 90405  
Telephone: 310-314-8860  
Facsimile: 310-314-8862

200 South Biscayne, Suite 3160  
Miami, Florida 33131  
Telephone: 305-373-1100  
Facsimile: 305-358-1226

5360 Holiday Terrace  
Kalamazoo, Michigan 49009  
Telephone: 616-353-3800  
Facsimile: 616-353-3806

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

**ORIGINAL**

**In the Matter of  
Implementation of Cable Act Reform  
Provisions of the Telecommunications  
Act of 1996**

)  
)  
)

**CS Docket No. 96-85**

**RECEIVED**

**AUG 02 1999**

**FCC MAIL ROOM**

**PETITION FOR RECONSIDERATION  
AND PARTIAL STAY  
OF SMALL CABLE AFFILIATION RULES**

**AMERICAN CABLE ASSOCIATION**

**Of Counsel:**

**Matthew M. Polka  
President  
American Cable Association  
One Parkway Center  
Suite 212  
Pittsburgh, Pennsylvania 15220  
(412) 922-8300**

**Eric E. Breisach  
Christopher C. Cinnamon  
Lisa Chandler Cordell**

**Blenstock & Clark  
5360 Holiday Terrace  
Kalamazoo, Michigan 49009  
(616) 353-3900**

**Attorneys for American Cable  
Association**

**July 31, 1999**

## TABLE OF CONTENTS

<b>SUMMARY .....</b>	<b>1</b>
<b>I. INTRODUCTION .....</b>	<b>1</b>
<b>II. BACKGROUND .....</b>	<b>2</b>
<b>III. THE PASSIVE INVESTOR DISTINCTION REMAINS CRITICAL TO SMALL CABLE. ....</b>	<b>4</b>
<b>IV. THE COMMISSION SHOULD REPEAL THE LIMITATIONS IMPOSED ON THE PASSIVE INVESTOR EXCEPTION. ....</b>	<b>6</b>
<b>A. The Limitations On Passive Investor Treatment Do Not         Reflect Marketplace Realities. ....</b>	<b>6</b>
<b>B. The Absence of a Meaningful Passive Investment Exception         Will Hinder Small Cable. ....</b>	<b>7</b>
<b>V. THE COMMISSION SHOULD ADOPT RESTRICTIONS THAT PARALLEL THE AFFILIATION STANDARDS USED BY THE SMALL BUSINESS ADMINISTRATION. ....</b>	<b>8</b>
<b>VI. THE COMMISSION SHOULD STAY ENFORCEMENT OF THE PASSIVE INVESTOR LIMITATIONS PENDING RECONSIDERATION .....</b>	<b>9</b>
<b>VII. CONCLUSION .....</b>	<b>10</b>

## **SUMMARY**

AT&T, Time Warner, Charter and the other titans of the cable industry have most of their revenue streams deregulated, yet the smallest cable businesses -- those operating thousands of systems serving rural America -- remain subject to regulation of virtually all of their revenue streams. That is the impact of the Commission's recent *Order* in this docket. That result is fundamentally unfair and directly conflicts with the outcome Congress sought.

In 1996, Congress enacted important relief for small cable businesses. Congress accelerated CPST deregulation for small cable and totally deregulated those that provided a single tier of service (e.g., basic-only systems). Basic-only systems remain common in the most rural areas. The over-inclusiveness of the Commission's affiliation rules, however, strips these systems of their deregulated status, subjecting virtually the entire revenue stream of these small cable businesses to regulation in perpetuity.

The Commission's final rule, while recognizing some of the critical issues, still wrongfully precludes many small cable businesses from receiving that relief. The American Cable Association files this Petition for Reconsideration and Partial Stay to address critical deficiencies relating to the Commission's decision in its *Cable Act Reform Order*.

The Commission correctly recognizes that for purposes of small operator deregulation truly passive investments should not trigger an affiliation; however, limitations placed on those passive investments render the passive investment exception superfluous. A meaningful passive investment exception to affiliation remains critical to small cable. Without it, small cable will remain crippled in its ability to secure additional capital, hindering small cable's ability to effectively compete in this rapidly advancing multichannel

video programming market and relegating much of rural America to a widening of the "digital divide."

The record shows that small operators' deregulatory status is a primary concern for investors. Institutional investors do not generally seek to control the cable operator's business but merely to protect their investment. The limitations placed on the passive investor exception, however, go too far. They require investors to forego even the most minimal measures of protection, e.g., holding a seat on the operator's board of directors or review of the broadest of annual budgets or business plans. Given this Hobson's choice, investors will once again forego small cable investment opportunities.

As the Association explained in earlier stages of this proceeding, the affiliation standards used by the Small Business Administration ("SBA") adequately prevent investors from exercising control without hindering small businesses' ability to attract capital. The Commission should therefore repeal its newly implemented limitations on the passive investment exception to affiliation in favor of SBA's standards.

The Association, which has sought relief for over three years on this issue, requests that the Commission stay the effectiveness of the limitations on passive investments pending Commission action on this Petition. This will serve to maintain the status quo by preserving existing investment arrangements and allowing small cable to continue its efforts to enter into crucial investment relationships.

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

<b>In the Matter of</b>	)	
<b>Implementation of Cable Act Reform</b>	)	<b>CS Docket No. 96-85</b>
<b>Provisions of the Telecommunications</b>	)	
<b>Act of 1996</b>	)	

**PETITION FOR RECONSIDERATION  
AND PARTIAL STAY  
OF SMALL CABLE AFFILIATION RULES**

**I. INTRODUCTION**

The American Cable Association (formerly the Small Cable Business Association) ("Association" or "American Association") timely files this Petition for Reconsideration<sup>1</sup> to address critical deficiencies in the Commission's decision in the above-captioned proceeding.<sup>2</sup> With its *Cable Act Reform Order*, the Commission took a critical step towards

---

<sup>1</sup> See *In the Matter of Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, Report and Order in CS Docket No. 96-85, FCC 99-58 (released March 29, 1999) ("*Cable Act Reform Order*"). The Commission's decision appeared in the Federal Register on July 2, 1999. See 64 FR 35948. Under 47 C.F.R. §§ 1.429(d) and 1.4(b)(1), a party must file its petition for reconsideration within 30 days of that date, that is, by August 1, 1999, a Sunday. Petitions for Reconsideration therefore become due on Monday, August 2, 1999.

<sup>2</sup> The Association has an interest in this proceeding as a participant in the Commission's earlier rulemaking proceeding. See *In the Matter of Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, Comments of the Small Cable Business Association (June 4, 1999) and Reply Comments of the Small Cable Business Association (June 28, 1999); see also Ex Parte Supplement Regarding Affiliation Standards by the Small Cable Business Association (October 11, 1996) ("*SCBA Supplemental Comments*"); Ex Parte letter of the Small Cable Business Association (November 11, 1998).

recognizing that passive investments should not give rise to an affiliation. The Commission's decision, however, falls short. The limitations that the Commission placed on passive investments generally have no rational relation to the degree of control an investor can exert over the cable operator. As the Association explains below, to give substantive meaning to the passive versus active investor distinction, the Commission must repeal certain additional restrictions contained in the *Cable Act Reform Order*.

The Association files this Petition on behalf of its nearly 300 member smaller cable businesses and their small cable systems (collectively "small cable") that serve more than 2.3 million subscribers nationwide. The majority of the Association's members have fewer than 1,000 total subscribers. Then known as the Small Cable Business Association, smaller, independent cable businesses formed the Association in 1993 to represent the collective interests of its members and to speak with a unified voice regarding issues affecting their businesses. The Association regularly represents its members' interests in Commission proceedings to inform the Commission of characteristics and concerns of smaller and independently owned cable businesses and to ensure that Commission decisions do not unfairly and adversely impact its members' businesses.

## **II. BACKGROUND**

In its *Cable Reform Act Order* proceeding, the Commission, pursuant to congressional mandate, sought to place limitations on the size of companies that qualify for small operator status under the Telecommunications Act of 1996 ("1996 Act"). For purposes of determining affiliation under Section 301(c) of the Telecom Act, the Commission adopted a 20% ownership threshold, concluding that "investments at this level

provide sufficient incentive for the affiliated entity to provide financial support to the smaller cable entity."<sup>3</sup>

The Commission also determined that it would exclude "truly passive investments when determining whether an investor's interest in a cable operator exceeds 20% for purposes of small cable operator deregulation."<sup>4</sup> The Commission reasoned that "counting truly passive investment toward the 20% affiliation standard could punish a large number of operators that presumably were the intended beneficiaries of the small operator provision of the 1996 Act."<sup>5</sup> The Commission, however, also concluded that it would not consider equity investors' interests as passive in any of the following situations:

- ◆ A representative of the investor sits on the cable operator's board of directors or advisory committee, or otherwise has involvement in the operation of the business.<sup>6</sup>
- ◆ The investor "retains the authority to approve or disapprove the cable operator's standard business transactions."<sup>7</sup>

The Commission reasoned that in such instances, "the investor is taking an active role in the operation of the cable system and thus should be deemed affiliated with the operator, if the investment meets the 20% threshold."<sup>8</sup> Recognizing that the distinctions drawn differ from the approach used by the Commission in other contexts, the Commission defended

---

<sup>3</sup> See *Cable Act Reform Order*, FCC 99-57 at ¶¶ 69-70.

<sup>4</sup> See *id.* at ¶ 73.

<sup>5</sup> See *id.*

<sup>6</sup> See *id.*

<sup>7</sup> See *id.*

<sup>8</sup> See *id.* at ¶ 73.



its decision as addressing concerns other than program content influence or anticompetitive economic incentives.<sup>9</sup> Instead, the Commission believes that the concern presented in the context of small cable operator deregulation focuses on "limit[ing] the class of operators to whom this exemption applies while not cutting off investments that will aid in system growth and modernization."<sup>10</sup>

These restrictions, however, largely render the passive investment exception superfluous. The Association therefore files this Petition to request that the Commission repeal these restrictions on passive investments.

### **III. THE PASSIVE INVESTOR DISTINCTION REMAINS CRITICAL TO SMALL CABLE.**

The passive investor distinction remains critically important to small cable. Notwithstanding the sunset of cable programming service tier ("CPST") rate regulation earlier this year, basic service rate deregulation remains a critical concern for many small cable operators. Many, mainly larger cable operators, have benefitted from rate deregulation; the same is not true for many of the smallest operators that do not offer multiple tiers of service. Compared to the majority of the cable industry that has a significant portion of its rates deregulated, these single-tier providers remain subject to regulation of virtually all of their services. This regulation will continue in perpetuity until the Commission rectifies its actions. For these smallest operators, access to outside capital becomes even more important, yet, as discussed below, the restrictions imposed by the Commission will deter such investment.

---

<sup>9</sup> See *id.*

<sup>10</sup> See *id.*

The Commission's decision raises an additional concern. The limitations placed on passive investments bear no rational relationship to the underlying goals of the small operator provisions at issue. The Commission states that the small operator provisions of the 1996 Act seek to "minimiz[e] regulation and enhanc[e] the capital attractiveness of small cable entities, while ensuring that the benefits of small system regulation are not extended to larger entities where such relief is unnecessary and inappropriate."<sup>11</sup> In seeking to narrow the application of the passive investor exception to "truly passive investments," the Commission erroneously presumes that access to capital will provide the operator with access to the expertise and personnel needed to comply with rate regulation burdens.<sup>12</sup> Minimal measures taken by an otherwise passive investor to protect its investment, e.g., sitting on the cable operator's board, reviewing or approving overall annual budgets or business plans, will not give the small cable business access to additional financial resources of the investor.<sup>13</sup> Such measures, similarly, will not give rise to operational advantages that make small operator relief unnecessary.<sup>14</sup> Unlike the situation where affiliation with a larger multi-system operator provides the small operator with expertise and operational efficiencies, investment by an institutional investor provides nothing more than a set amount of capital. The limitations that the Commission places on

---

<sup>11</sup> See *Cable Act Reform Order* at ¶ 67.

<sup>12</sup> See *Cable Act Reform Order* at note 211.

<sup>13</sup> *Id.* ("[T]he affiliation test in the context of the \$250 million revenue threshold focuses on access to financial resources.")

<sup>14</sup> See *Cable Act Reform Order* at ¶ 72 (As institutional investors have explained, "passive investment does not afford operational advantages to the cable operator.").

the passive investor exception therefore serve no purpose in terms of ensuring that only those cable operators that lack the resources to comply with rate regulations qualify for deregulatory status.

#### **IV. THE COMMISSION SHOULD REPEAL THE LIMITATIONS IMPOSED ON THE PASSIVE INVESTOR EXCEPTION.**

The limitations placed on passive investments bear no rational relationship to the objectives of small operator deregulation, making the Commission's decision arbitrary and capricious. The limitations ignore marketplace realities and will hinder capital investment in small cable.

##### **A. The Limitations On Passive Investor Treatment Do Not Reflect Marketplace Realities.**

The Commission's decision to limit application of passive investor treatment to situations where the investor does not hold a seat on the cable operator's board or otherwise become involved in the business' operation, or retain the authority to approve or disapprove standard business transactions ignores marketplace realities. The record shows that passive investors do not seek to exercise control over the cable operator's business but only to maintain limited oversight to ensure protection of their investments:

- ◆ "General Electric Capital Corporation claims that passive investors do not seek day-to-day management of the enterprise and would only seek to engage in limited oversight to ensure compliance with ownership and attribution rules. Thus, it argues for a passive/active distinction to ensure that investors do not shy away from cable operators when greater investment would fail to maximize the revenue advantages that stem from small operator status."<sup>15</sup>
- ◆ "J.P. Morgan and other investment banks contend that small operators pose capital risks that underscore the importance of maximizing revenue potential.

---

<sup>15</sup> See *Cable Act Reform Order* at ¶ 72.

Accordingly, these investors assert that they would not risk losing such advantages by taking their investment beyond the 20% threshold."<sup>16</sup>

- ◆ "[T]hese institutions emphasize that their passive investments are conducted on behalf of investor-clients, and their primary allegiance is to these individuals rather than to the cable operator receiving the capital investment. Thus, passive investment does not afford operational advantages to the cable operator."<sup>17</sup>

**B. The Absence of a Meaningful Passive Investment Exception Will Hinder Small Cable.**

Under the Commission's newly promulgated rules, many small operators' current and future relationships with investors threatens, or could threaten, their deregulatory status. Capital infusion from institutional and other investors, however, remains vitally important for small cable. A regulatory regime that threatens to undermine these investment relationships will greatly inhibit capital investment in small cable and, therefore, hinder small cable's ability to effectively compete in this rapidly advancing multichannel video programming market. The inability to attract capital will also "relegate much of rural America served by small cable to a lower quality of service"<sup>18</sup> and cripple small cable's ability to deploy digital and other advanced services to rural America, widening, not narrowing the "digital divide."

Without deregulatory status, investment in small operators becomes less attractive. Arguing in favor of an active-passive investor distinction, J.P. Morgan and other investment banks explained, "small operators pose capital risks that underscore the importance of

---

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> See *SCBA Supplemental Comments* at 2.

maximizing revenue potential. Accordingly, these investors assert that they would not risk losing such advantages by taking their investment beyond the 20% threshold."<sup>19</sup>

While acceding to the need for a passive investment exception, the limitations placed on such investments will threaten many investment arrangements. To ensure continued deregulatory status, passive investors would have to forego even minimal measures ordinarily taken to protect their investments – measures entirely permitted under the U.S. Small Business Administration's rules. Charged with protecting the investments made on their clients' behalf, investors will instead choose not to invest in small cable businesses.

**V. THE COMMISSION SHOULD ADOPT RESTRICTIONS THAT PARALLEL THE AFFILIATION STANDARDS USED BY THE SMALL BUSINESS ADMINISTRATION.**

The Association implores the Commission to adopt the Small Business Administration's ("SBA") affiliation standards.<sup>20</sup> Unlike the Commission's newly promulgated regulations, the SBA's standards adequately prevent investors from exercising control without hindering small businesses' ability to attract capital. The SBA regulations contain sufficient detail to allow measures to protect investment without automatically forfeiting passive investment status.

---

<sup>19</sup> See *Cable Act Reform Order* at ¶ 72.

<sup>20</sup> See *SCBA Supplemental Comments* (filed October 11, 1996) (The Association explained in detail the SBA's affiliation standards and appended relevant SBA regulations.)

**VI. THE COMMISSION SHOULD STAY ENFORCEMENT OF THE PASSIVE INVESTOR LIMITATIONS PENDING RECONSIDERATION.**

The Commission's newly promulgated rules threaten to jeopardize existing and future investment arrangements. Because the need for capital investment remains critically important to small cable, especially in light of the rapidly advancing multichannel video programming market, the Commission should stay enforcement of the limitations to the passive investor exemption pending reconsideration of this aspect of the Commission's decision. Staying the effectiveness of the limitations placed on passive investment will preserve existing relationships and permit continuing efforts by small cable operators to enter investment relationships without jeopardizing their deregulatory status. Should the Commission ultimately decide on reconsideration to adopt the SBA's affiliation standards, no harm will come to these relationships. If, however, the Commission reaffirms its passive investor limitations, the Commission should grandfather investment arrangements that exist as of the date such decision takes effect. Staying the limitations on passive investment will maintain the status quo pending the outcome of this matter.

## VII. CONCLUSION

The Commission's decision fails to provide meaningful relief to small cable operators. While the Commission attempts to protect against cable operators abusing deregulatory status without hindering small operators' attractiveness to capital investments, its decision falls short. The limitations placed on passive investments render the passive investor exception superfluous. The Commission's decision to impose these restrictions is therefore arbitrary and capricious. The Commission should repeal these limitations in favor of the passive investor restrictions used by the U.S. Small Business Administration. These standards will prevent passive investors from exercising control without jeopardizing capital investment in small cable businesses.

Respectfully submitted,

**AMERICAN CABLE ASSOCIATION**

By: Lisa Chandler Cordell

Of Counsel:  
Matthew M. Polka  
President  
American Cable Association  
One Parkway Center  
Suite 212  
Pittsburgh, Pennsylvania 15220  
(412) 922-8300

Eric E. Breisach  
Christopher C. Cinnamon  
Lisa Chandler Cordell<sup>21</sup>

Blenstock & Clark  
5360 Holiday Terrace  
Kalamazoo, Michigan 49009  
(616) 353-3900

Attorneys for American Cable  
Association

July 31, 1999

---

<sup>21</sup> Resident in the Chicago, Illinois office only.

## **CERTIFICATE OF SERVICE**

I, Lisa Chandler Cordell, an attorney with Bienstock & Clark, certify that I sent a copy of the foregoing PETITION FOR RECONSIDERATION AND PARTIAL STAY OF THE SMALL CABLE AFFILIATION RULES on this 31<sup>st</sup> day of July, 1999, via Federal Express, for delivery on Monday, August 2, 1999, to each of the following:

Jere Glover  
Chief Counsel of Advocacy  
United States Small Business Administration  
409 Third Street, SW - Suite 7800  
Washington, DC 20416

Chairman William Kennard  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW - 8<sup>th</sup> Floor  
Washington, DC 20024

Commissioner Harold Furchtgott-Roth  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW - 8<sup>th</sup> Floor  
Washington, DC 20024

Commissioner Susan Ness  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW - 8<sup>th</sup> Floor  
Washington, DC 20024

Commissioner Michael Powell  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW - 8<sup>th</sup> Floor  
Washington, DC 20024

Commissioner Gloria Tristani  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW - 8<sup>th</sup> Floor  
Washington, DC 20024

Deborah A. Lathen, Bureau Chief  
Cable Services Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW - 3<sup>rd</sup> Floor  
Washington, DC 20024

William H. Johnson, Deputy Bureau Chief  
Cable Services Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW - 3<sup>rd</sup> Floor  
Washington, DC 20024

  
Lisa Chandler Cordell  
Lisa Chandler Cordell